JAN 30 1946
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1945—No. 1021

In the Matter of

CHILDS COMPANY, Debtor

In Proceedings for Reorganization under Chapter X of the Bankruptcy Act—No. 82,878.

THE 415 FIFTH AVENUE COMPANY, INC.,
Petitioner,

against

JOHN F. X. FINN, as Trustee of Childs Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LOWELL M. BIRRELL,
Counsel for Petitioner.

THEODORE E. LARSON,
Of Counsel.

TABLE OF CONTENTS

PAGE

PETITION:

I. Summary and Short Statement of the Matter Involved 2

II. Grounds of Jurisdiction 6

III. The Questions Presented and Reasons for Granting the Writ 6

BRIEF:

POINT I.—The Circuit Court of Appeals erred in holding that the power of the District Court to enforce its order of September 27, 1944, as amended, was subject to the restraints imposed by the Rent Control Law 9

POINT II.—Respondent was not a "tenant" entitled to invoke the protection of the Rent Control Law 11

POINT III.—The Rent Control Law, as applied to the order awarding possession to petitioner, affects procedure and not substantive rights, and was not binding on the District Court 15

POINT IV.—Section 8 (e) of the Rent Control Law discriminates against owners of real estate occupied by bankruptcy trustees, in violation of the Fourteenth Amendment 16

POINT V.—The writ of certiorari should be granted 17

Table of Cases Cited.

PAGE

Chicago Auditorium v. Cramer, 8 F. (2d) 998, 1004 16
Cohen v. Starke, 269 App. Div. 256 13
Hodges v. Snyder, 261 U. S. 600, 603 10
McCullough v. Virginia, 172 U. S. 102, 123 10
Sibbach v. Wilson & Co., 312 U. S. 1, 14 16
The 415 Fifth Ave. Co., Inc. v. Finn, 146 F. (2d) 592, 593 14
Tower Hill-Connellsville Coke Co. v. Piedmont Coal Co., 64 F. (2d) 817, 828 15

Statutes Cited.

Chapter 314, Laws of New York of 1945 ..... 2, 4, 5, 11
Chapter 3, Laws of New York of 1945 ..... 12, 13
Chapter 315, Laws of New York of 1945 12
Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347) 6
Section 24 (c) of the Bankruptcy Act (11 U. S. C. A., Sec. 47 (c)) 6
Chapter X of the Bankruptcy Act (11 U. S. C. A., Secs. 501 et seq.) 2, 9

Authorities Cited.

Holland on Jurisprudence, 13 Ed., p. 90 15

IN THE

Supreme Court of the United States

October Term, 1945—No.

In the Matter of

CHILDS COMPANY, Debtor

In Proceedings for Reorganization under Chapter X of the Bankruptcy Act—No. 82,878.

THE 415 FIFTH AVENUE COMPANY, INC., *Petitioner,*

against

JOHN F. X. FINN, as Trustee of Childs Company, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Your Petitioner, The 415 Fifth Avenue Company, Inc. respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a decree of that Court entered in the above entitled proceeding on January 8, 1946. Said decree affirmed an order of the District Court for the Southern District of New York, dated June 26, 1945 (R. 25) which extended until July 1, 1946, the time within which the Debtor and its Trustee, the respondent, were required to surrender to petitioner-owner the premises 1551 Broadway, New York City, pursuant to a prior order of the District Court dated September 27, 1944 (R. 7) adjudging that the lease thereof by peti-

tioner's predecessor, as landlord, to the Debtor, as lessee, had terminated on June 23, 1944 and ordering respondent and the Debtor to surrender the premises within thirty (30) days from September 27, 1944. The Circuit Court of Appeals sustained the District Court in holding that it was obliged to grant the extension of time, because of the enactment of Chapter 314 of the New York Laws of 1945, in effect March 28, 1945. This statute, which will be referred to herein as the Rent Control Law, declared that an emergency with respect to business space existed in New York City, which would continue until July 1, 1946 and prohibited the eviction of any tenant of business space during that period, if the tenant paid an "emergency rent" equal to the rent in effect on June 1, 1944 plus 15% thereof.

I.

Summary and Short Statement of the Matter Involved.

The lease was for a term commencing May 19, 1941 and expiring May 1, 1947, with renewal privileges, and gave the landlord the right to terminate if the Debtor filed a petition in bankruptcy, or was adjudicated a bankrupt, or if a trustee was appointed for the Debtor's property (R. 4). On August 26, 1943, the Debtor filed its petition for reorganization under Chapter X of the Bankruptcy Act in the United States District Court for the Southern District of New York. On the same day the District Court approved the petition and appointed respondent as the Debtor's Trustee (R. 16). Respondent then took possession of the premises. On June 23, 1944, petitioner exercised its right of termination by written notice to respondent and the Debtor (R. 2). On the application of peti-

tioner (R. 4) the District Court granted the order of September 27, 1944 (R. 7), which was affirmed by the Circuit Court of Appeals for the Second Circuit on January 18, 1945 (R. 16). Pending the appeal, execution of the order was stayed (R. 10). Respondent's petition for certiorari was denied by this Court on May 7, 1945 (R. 18).

By another order, also dated September 27, 1944, granting the petition of Burton C. Meighan, the landlord of the adjoining premises 1553 Broadway (which had been leased to the Debtor by a lease providing that it should terminate in the event of the Debtor's insolvency), it was adjudged that the latter lease had terminated on August 26, 1943, the date of the appointment of the trustee. This order, which directed that the latter premises be surrendered to Mr. Meighan within thirty days, was also affirmed by this Court on January 18, 1945 (R. 16).

By order dated February 1, 1945, the time for surrender of 1551 Broadway to petitioner and 1553 Broadway to Mr. Meighan, was extended to February 26, 1945 (R. 11). Upon the application of respondent, on February 9, 1945, this Court stayed execution of the mandate of the Circuit Court, issued upon the affirmance of the order of September 27, 1944 for the surrender of 1553 Broadway to Mr. Meighan, pending application for a writ of certiorari with respect to the proceedings affecting the latter premises only. Such writ was granted on March 5, 1945 (R. 17) and on May 21, 1945 this Court affirmed (R. 32).

Although petitioner was not a party to or in any way affected by the review in this Court respecting 1553 Broadway, the District Court granted two other orders delaying the surrender of 1551 Broadway to petitioner, to await the outcome of the appeal to this Court from the mandate for the surrender of 1553 Broadway. The first of these orders, dated February 27, 1945 (R. 12) postponed the

time for the surrender of 1551 Broadway to petitioner until the eighteenth day after the granting or denial of certiorari with respect to 1553 Broadway. After certiorari was granted, the second order, dated March 16, 1945 (R. 14) further postponed the surrender of 1551 Broadway until the eighteenth day after the decision of this Court on the appeal relative to 1553 Broadway. That decision having been rendered on May 21, 1945, the time for surrender under the second order, expired on June 8, 1945.

On May 16, 1945 (R. 16) respondent petitioned the District Court for a further postponement until July 1, 1946, on the ground that under the Rent Control Law respondent had the right to remain in possession until the expiration of the emergency on that date, upon payment of the emergency rent, which had been offered to and refused by the petitioner (R. 19). The District Court granted the petition by the order of June 26, 1945, which, as above stated, was affirmed by the Circuit Court on January 8, 1946. Neither the opinion of the Circuit Court of Appeals, nor of the District Court (R. 31), has been reported.

The relevant provisions of the Rent Control Law are as follows:

Section 1 declaring the existence of an emergency created by oppressive leases and agreements for rent of business space, which rendered the legislation necessary.

Section 2 defining various terms used in the law, as follows:

(a) Defining business space, in terms which include petitioner's premises.

(c) Defining emergency rent as the rent reserved or payable under any lease, agreement or tenancy of business space in force on June 1, 1944, plus 15% thereof.

(e) " 'Tenant.' A lessee, sublessee, licensee, or other person entitled to the possession or to the use or occupancy of the whole or a part of any business space."

Section 8 providing as follows:

> "So long as the tenant continues to pay the rent to which the landlord is entitled, under the provisions of this act, no tenant shall be removed from any business space, by action or proceeding to evict or to recover possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and notwithstanding the issuance of any order to dispossess, warrant or process prior to the effective date of this act, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which is inconsistent with any of the provisions of this act, unless:
>
> (e) The tenant, whose lease or rental agreement has expired or shall hereafter expire during the continuance of the emergency declared by this act, has refused, subsequent to the date this act takes effect and within a period of six months prior to such expiration, to execute, upon demand of the landlord, a renewal of the prior lease or rental agreement for a further term of like duration or for such shorter term as the landlord may elect, on substantially similar terms and conditions as are contained in such prior lease or rental agreement, provided that the terms and conditions of such renewed lease or rental agreement are not inconsistent with any of the provisions of this act, and provided further that the rent reserved in such renewed lease or rental agreement may be any amount not in excess of the emergency rent for such tenant's business space. The landlord shall not be entitled to seek a fixation of rent pursuant to section four of this act where the rent reserved in any such renewed lease or rental agreement is less than the emergency rent."

II.

Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347) and Section 24 (c) of the Bankruptcy Act.

III.

The Questions Presented and Reasons for Granting the Writ.

QUESTION 1. Whether the enforcement of a lawful final order of a District Court of the United States, disposing of property of the estate of an insolvent over which it had jurisdiction, can be enjoined or postponed by legislation subsequently enacted by the State in which the District Court sits and in which the property is located.

REASON—The Circuit Court of Appeals erred in deciding that the power of the District Court to enforce its order of September 27, 1944, as amended, was subject to the restraints imposed by the Rent Control Law.

QUESTION 2. Whether respondent was a tenant of petitioner's premises, within the meaning of Section 2 (e) of the Rent Control Law, by virtue of his continued possession pursuant to stays by the District Court of the execution of its order for his removal, pending appeal to this Court from the mandate for his removal from adjacent premises.

REASON—The Circuit Court misconceived the effect of the stays in holding that for their duration respondent was "entitled" to possession.

QUESTION 3. Whether the Rent Control Law, assuming its applicability to the order of September 27, 1944 and the orders postponing surrender of possession (*supra* pp. 3, 4), would merely restrain the procedural steps necessary to enforce substantive rights previously adjudicated by such orders and would therefore not be binding on the Federal District Court.

REASON—The District Court having, long prior to the enactment of the Rent Control Law, finally adjudged that the lease and all rights of respondent and the Debtor had ceased, thus definitively adjudicating all substantive rights and leaving in abeyance only those proceedural matters relating to enforcement, it was error for the Circuit Court to hold that a question of substantive local law was involved.

QUESTION 4. Whether Section 8 (e) of the Rent Control Law denies to petitioner the equal protection of the law in violation of the Fourteenth Amendment, in that it accords to the landlord of a solvent tenant the right of eviction where the tenant refuses to renew an existing lease, whereas a landlord of a bankruptcy trustee could not invoke this protection in view of the limitations upon the power of such trustee.

REASON—The Circuit Court erred in failing to hold that such discrimination rendered the statute unconstitutional as applied to the present case.

WHEREFORE petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals for the Second Circuit be reversed; and that petitioner be granted such other and further relief as may be just and proper.

Dated: New York, N. Y.
March 29th, 1946.

LOWELL M. BIRRELL,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1945—No.

In the Matter of

CHILDS COMPANY, Debtor

In Proceedings for Reorganization under Chapter X of the Bankruptcy Act—No. 82,878.

THE 415 FIFTH AVENUE COMPANY, INC., *Petitioner,*

against

JOHN F. X. FINN, as Trustee of Childs Company, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts and the questions presented are set forth in the petition. The questions will be discussed in the order in which they are stated in the petition.

POINT I.

The Circuit Court of Appeals erred in holding that the power of the District Court to enforce its order of September 27, 1944, as amended, was subject to the restraints imposed by the Rent Control Law.

Acting under its constitutional power to establish a uniform system of bankruptcy, Congress by Chapter X of the Bankruptcy Act conferred upon the District Court exclu-

sive jurisdiction of the Debtor and its property, wherever located. The District Court, in the proper exercise of such jurisdiction over property of the Debtor consisting of the leasehold, solemnly adjudged that the lease had expired and petitioner was entitled to possession. Unless and until reversed on appeal, such judgment conclusively established petitioner's right and respondent's duties.

Private rights which have been vested by the judgment of a court having jurisdiction of the subject matter and the parties cannot be taken away by subsequent legislation but must be enforced by the court regardless of such legislation. It is not within the power of a legislature to take away rights which have been once vested by a judgment.

Hodges v. *Snyder,* 261 U. S. 600, 603.
McCullough v. *Virginia,* 172 U. S. 102, 123.

Petitioner's right to the restoration of its property became vested and final on September 27, 1944. The lower courts have held in effect, that this right was not violated by the Rent Control Law because the law did not destroy the right but merely postponed enforcement, during the existence of an emergency, until July 1, 1946. When this date arrives, legislation now pending will undoubtedly have extended the emergency until July 1, 1947. Experience teaches that the legislation will be renewed indefinitely, year after year; and so, year after year, respondent and his successors in interest will seek, and the District Court will be obliged to grant, order after order prolonging the occupant's possession and depriving petitioner of the benefits of the judgment in his favor. To describe this as a mere postponement of remedy, rather than nullification of the District Court's judgment, seems altogether illusory.

If, in this case, later State legislation can constitutionally override the valid judgment of a Federal Court, ex-

ercising its jurisdiction in the administration of an insolvent debtor's estate, there would seem to be no reason why similar "emergency" measures could not invalidate any valid final decision or decree of a Federal Court or official body in the proper exercise of its powers.

Whether or not a State possesses any such veto power is a question of far reaching importance in relation particularly to bankruptcy administration and generally to those situations in which problems arise concerning the controlling effect of Federal or State law. It is respectfully urged that this question is one which has not, and should be, decided by this Court.

POINT II.

Respondent was not a "tenant" entitled to invoke the protection of the Rent Control Law.

The question here presented relates primarily to the effect, upon respondent's status, of the District Court stays which enabled him to continue in possession pending appellate proceedings. This involves the determination of the rights and obligations of litigants under decrees and orders of a Federal Court. Only incidentally involved is the meaning and effect of the Section 2 (e) of the Rent Control Law defining a tenant as follows:

> "A lessee, sublessee, licensee, or other person entitled to the possession or to the use or occupancy of the whole or a part of any business space" (*supra*, p. 5).

The restrictions against eviction, contained in Section 8 (*supra*, p. 5), apply only to a tenant. Was respondent a "tenant" on March 28, 1945, when the law took effect *

and respondent was in possession pursuant to the order of March 16, 1945 (R. 14) which in effect stayed his eviction until June 8, 1945, *i. e.*, until the eighteenth day after this Court's decision, on May 21, 1945, affirming the order affecting 1553 Broadway? Was he a "tenant" at any time during the various stay periods?

The order of September 27, 1944 (R. 7) adjudging that the lease had terminated and awarding possession to petitioner, precludes any claim that thereafter respondent was a lessee, sublessee or licensee. Was he, then, for the duration of the stays, a "person entitled to possession or to the use and occupancy" of the premises?

The purpose of the stays was to maintain the status quo pending appeal. When this Court denied certiorari, the effect of its order was retroactive and restored petitioner to the rights and remedies it would have enjoyed, had there been no appeals and no stays. Likewise as to respondent's duty to surrender possession. Performance of the duty, but not the duty itself, had been held in abeyance as a matter of judicial grace.

To be "entitled to possession" the possessor must show some *legal right* to possession. "Entitled to possession" and "having a legal right to possession" are synonymous terms. The District Court's judgment confirmed petitioner's and denied respondent's right to possession. Stay

---

* The opinion of the Circuit Court of Appeals (R. 45) states that the law was effective retroactively as of January 24, 1945. This is an error. Chapter 314 of the Laws of 1945, relating to "business space", became a law March 28, 1945, with the approval of the Governor, and contained no provision as to retroactive effect. Chapter 3 of the Laws of 1945 became a law January 24, 1945. This controlled rents and evictions as to "Commercial Space" and was not applicable to petitioner's premises, which constitute "business space" as defined by Chapter 314. By Chapter 315, which became a law on March 28, 1945, Chapter 3 was amended in various respects, retroactively as of January 24, 1945.

of *enforcement* of petitioner's right did not take away the right or confer it on respondent. The stay merely permitted *temporary violation* of petitioner's right.

The lower courts (R. 33, 45), in holding that respondent was a tenant, placed much emphasis on *Cohen* v. *Starke,* 269 App. Div. 256, a New York decision which construed Section 2 (i) of Chapter 3 of the Laws of 1945, in effect January 24, 1945, which defined a tenant as "A lessee, sublessee, licensee, or other person entitled to the possession or to the use or occupancy of the whole or a part of any commercial space." That statute, like the one here involved, forbade the eviction of a tenant willing to pay an "emergency rent." The landlord, pursuant to one of its provisions, had cancelled the lease and commenced summary proceedings to recover possession, in which proceedings the tenant interposed an answer. At the trial, on January 15, 1945 a stipulation was made by which the tenant withdrew his answer and consented to the entry of a final order in favor of the landlord and the issuance of a warrant forthwith. A warrant was issued, but, in accordance with the agreement, execution was stayed until January 31. The tenant thereupon paid and the landlord accepted the rent for the month of January.

The tenant remained in possession after January 31 and the landlord demanded that the Marshal execute the warrant. The Marshal refused on the ground that execution had been stayed by the enactment of the statute on January 24. In a further proceeding to compel the Marshal to execute the warrant, one of the questions litigated was whether the occupant was a tenant within the meaning of the act on January 24. Obviously he was and the Court properly so held. Although his lease had expired, he had made and the landlord had accepted payment for use and occupancy of the space until January 31, the date to which,

with the landlord's consent, execution had been stayed. On January 24, therefore, he was clearly "entitled to the possession" of his space.

The present case differs from *Cohen* v. *Starke* in two vital particulars. First, there has been no payment of rent by respondent or acceptance thereof by petitioner since the lease was terminated on June 23, 1944. Petitioner's refusal of tendered payments (R. 19; see also *The 415 Fifth Ave. Co. Inc.* v. *Finn*, 146 F. (2d) 592, 593) was based on the fear that acceptance might support a claim by respondent that his possession was rightful. Second—petitioner has not consented to any stay. Each order postponing the time of surrender was granted over petitioner's opposition (R. 9, 11, 12, 14).

It is respectfully urged that petitioner and not respondent is the person who has been "entitled to possession" of the premises ever since October 27, 1944, when respondent was commanded to vacate by the order of September 27, 1944; that during this period respondent has been a trespasser, in the legal sense, profiting by his own wrong by retention of possession; and that the orders suspending petitioner's remedy for preventing the trespass did not create any right to continue the trespass.

A Federal question as to the interpretation and effect of the stay orders is presented, which merits review by this Court.

POINT III.

The Rent Control Law, as applied to the order awarding possession to petitioner, affects procedure and not substantive rights, and was not binding on the District Court.

It is elementary that a state statute cannot affect proceedings in federal courts sitting in equity and the jurisdiction of such a court cannot be enlarged or narrowed by a procedural state statute.

> *Tower Hill-Connellsville Coke Co.* v. *Piedmont Coal Co.*, 64 F. (2d) 817, 828.

In HOLLAND on *Jurisprudence*, 13 Ed., page 90, the author says that law "defines the rights which it will aid, and specifies the way in which it will aid them. So far as it defines, thereby creating, it is 'Substantive Law.' So far as it provides a method of aiding and protecting, it is 'Adjective Law' or Procedure."

Difficulty is frequently encountered in determining whether a given set of facts gives rise to a substantive right or presents merely a question of procedure. That is not true of the present case. As to the substantive rights of the parties, they were definitely determined by the order of September 27, 1944. The lease and all rights based thereon ceased. The owner's rights and those of the tenant were finally adjudicated. All that remained to be done was procedural—the enforcement of the substantive rights already determined. This could be done by the issuance of a warrant or other process for the physical removal of respondent's property from the premises, or possibly by punishing respondent for contempt for failure to obey the judg-

ment. Whatever form the proceeding took, it would be purely a method of procedure as defined by this Court in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 14, as follows:

> "The judicial process for enforcing rights and duties recognized by substantive law for justly administering remedy and redress for disregard or infraction of them."

The remedies afforded and modes of proceeding pursued in the federal courts, sitting as courts of equity, are not determined by local laws or rules of decision but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting.

> *Chicago Auditorium* v. *Cramer*, 8 Fed. (2d) 998, 1004.

The purported effect of Section 8 of the Rent Control Law providing that a tenant shall not be evicted, was to enjoin the District Court from enforcing its judgment. Whether the law merely affected procedure or created or regulated substantive rights is a question of general importance in relation to the jurisdiction of Federal Courts and ought to be settled by this Court.

POINT IV.

Section 8 (e) of the Rent Control Law discriminates against owners of real estate occupied by bankruptcy trustees, in violation of the Fourteenth Amendment.

In substance, said section provides that a holdover tenant may be evicted if he refuses, on demand of the landlord, to renew his lease for the same term or, at the land-

lord's election, for a shorter term. Without such a provision, the tenant would be free at his option to continue possession during the emergency period at the statutory rent or terminate the tenancy at his pleasure. The landlord would be bound but the tenant would not. To protect the landlord against this inequity, the statute withholds its benefits from a tenant who refuses to assume the burdens of a renewal lease. But this presupposes a tenant who is free to contract. Such freedom is not present in the case of trustee of a bankrupt tenant. The trustee could not renew, for a long term or short term, without court approval after hearing. A demand upon him would be a futile gesture. The statute therefore does not, and could not, give to the landlords of bankrupt tenants the protection which is available to other landlords who are similarly situated except that their property is not in the custody of a Court of Bankruptcy. The latter class of landlords is thereby denied the equal protection of the law.

POINT V.

The writ of certiorari should be granted.

Respectfully submitted,

LOWELL M. BIRRELL,
Counsel for Petitioner.

THEODORE E. LARSON,
Of Counsel.

LAWYERS PRESS, INC., 165 William St., N. Y. C.: 'Phone: BEekman 3-2100

21

Office - Supreme Court, U. S.
FILED
APR 25 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945 — No. 1021

IN THE MATTER

OF

CHILDS COMPANY, DEBTOR

In Proceedings for Reorganization under Chapter X
of the Bankruptcy Act — No. 82,868

THE 415 FIFTH AVENUE COMPANY, INC.,
Petitioner,

against

JOHN F. X. FINN, as Trustee of CHILDS COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH LORENZ,
Counsel for Respondent.

207 BAR PRESS, INC., 47 WEST ST., NEW YORK. BO. 9—0157 - 8

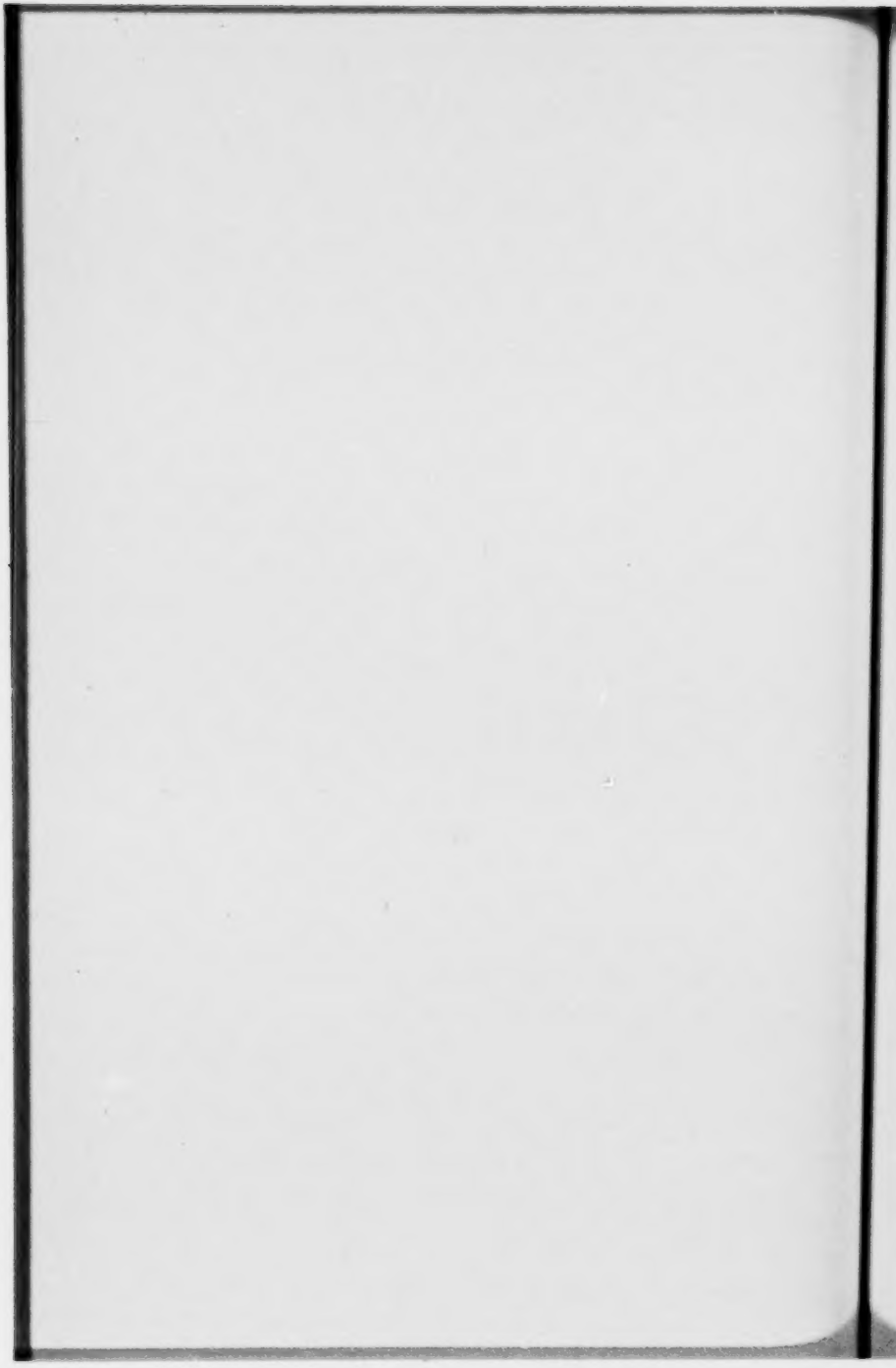

TABLE OF CONTENTS

	PAGE
I. Opinions Below	1
II. Statement of Facts	1
III. Summary of Argument	2
IV. Argument:	
1. The Circuit Court of Appeals correctly applied the controlling New York law to the facts in the instant case	3
2. Respondent was a tenant, entitled to invoke the protection of the Rent Control Law	13
3. The Rent Control Law affects substantive, not procedural, rights of the parties and was binding on the District Court	18
4. Section 8 (e) of the Rent Control Law does not discriminate against owners of real estate occupied by bankruptcy trustees in violation of the Fourteenth Amendment	19
V. Petition for a writ of certiorari should be denied	21

TABLE OF CASES CITED

PAGE

Cohen v. Starke, 269 App. Div. 256, 55 N. Y. Supp. 2nd 337 ..... 2, 7, 11, 15

East New York Savings Bank v. Hahn, 66 Sup. Ct. 69 ..... 3, 11

Erie v. Tompkins, 304 U. S. 64 ..... 3, 6, 12

Guaranty Trust Company of New York v. York, 326 U. S. 99 ..... 2, 6, 15

Hodges v. Snyder, 261 U. S. 600 10

Huddleston v. Dwyer, 322 U. S. 232 ..... 9, 12

McCullough v. Virginia, 172 U. S. 102 10

Thompson v. Consolidated Gas Company, 300 U. S. 55 ..... 13, 17

Thompson v. Magnolia Company, 309 U. S. 478 ..... 2, 6, 12, 15, 18

Tidal Oil Co. v. Flanagan, 263 U. S. 448 10

Twentieth Century Associates v. Waldman, 294 N. Y. 571 3

STATUTE CITED

Chapter 314, Laws of New York of 1945 ..... 4, 5, 15

IN THE

Supreme Court of the United States

October Term, 1945 — No. 1021

IN THE MATTER

OF

CHILDS COMPANY, DEBTOR

In Proceedings for Reorganization under Chapter X
of the Bankruptcy Act — No. 82,868

THE 415 FIFTH AVENUE COMPANY, INC.,
Petitioner,

against

JOHN F. X. FINN, as Trustee of CHILDS COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Opinions Below

The opinions of the Court of Appeals for the Second Circuit and of the District Court have not as yet been officially reported.

Statement of Facts

Inasmuch as petitioner's petition contains a full statement of the conceded facts, respondent omits any repeti-

tious statement thereof. Respondent, in the following points, will advert to the facts necessary for clarity of argument.

Summary of Argument

On March 28, 1945, the respondent was lawfully in possession of the premises 1551 Broadway, New York City. Although its lease of said premises had been cancelled, and respondent had been directed to vacate the said premises, its possession continued by virtue of a stay which had been granted by the United States District Court. The stay did not expire until June 8, 1945. No appeal has ever been taken from the order granting the stay, and its validity cannot now be questioned.

On March 28, 1945, the so-called Rent Control Law of the State of New York was enacted. This statute in effect provided that no person lawfully in possession of New York business premises could be dispossessed provided the tenant complied with certain prerequisites, not here material, and regardless of prior cancellation of the lease or the existence of any prior dispossess order.

In a situation substantially identical to that here involved, the Appellate Division of the Supreme Court of the State of New York has held in *Cohen* v. *Starke,* 269 App. Div. 256, that the Rent Control Law was applicable, and that the tenant could not be dispossessed.

It is fundamental, as this Court has held, that the federal courts are required to apply the law of a State, as announced by its courts, in a situation involving title or possession of real estate in that State. *Thompson* v. *Magnolia Company,* 309 U. S. 478. Nor is there any doubt that under the principle of *Guaranty Trust Co. of N. Y.* v. *York,* 326 U. S. 99, the rights here affected are substantive and not merely procedural.

Clearly, the federal courts must apply the law of the State as it is at the time of final disposition. As held in

Huddleston v. *Dwyer,* 322 U. S. 232, this is true even though the authoritative statement regarding the state law may have changed during the progress of the litigation. It necessarily follows that where new legislation under the police power of the State, such as the Rent Control Act, gives birth to a new state-created right, that right must be respected by the federal courts. Particularly is this true where, as in the present case, a declared public policy of the State of New York, arising out of emergency conditions, is involved. *Twentieth Century* v. *Waldman,* 294 N. Y. 571. *Cf. East New York Savings Bank* v. *Hahn,* 66 Sup. Ct. 69. A failure so to apply the state law would result in the anomalous situation wherein different sets of rules would govern the disposition of similar litigation in the state and federal courts, occasioned solely by the accident of jurisdiction—a result which has been repeatedly condemned by this Court.

Guaranty Trust Co. of N. Y. v. *York, supra;*
Erie v. *Tompkins,* 304 U. S. 64.

The principles governing the disposition of the case at bar are well established, and there appears no valid ground for granting a writ of certiorari.

POINT I

The Circuit Court of Appeals correctly applied the controlling New York law to the facts in the instant case.

On March 28, 1945, the respondent was lawfully in possession of the premises involved, although the District Court, in its order of September 27, 1944, had adjudged that respondent's lease had been validly cancelled, and had directed respondent to surrender possession of the premises.

Respondent's possession was continued by virtue of stay orders granted by the District Court, the last extension not expiring until June 8, 1945 (R., pp. 14, 15). No appeal has ever been taken from the orders granting the said stays, and their validity cannot be questioned at this late date.

After the entry of the stay order of the District Court dated March 16, 1945, the Legislature of the State of New York passed an emergency Rent Control Act, effective March 28, 1945, contained in Chapter 314 of the Laws of New York of 1945.

Section 1 of said Act provides:

> "Section 1. Unjust, unreasonable and oppressive leases and agreements for the payment of rent for office space and retail stores and other business space in certain cities having been and now being exacted by landlords under stress of prevailing conditions accelerated by the war, and an abundance of eviction proceedings against tenants having been commenced or threatened by landlords, whereby breakdown has taken place in normal processes of bargaining and freedom of contract has become an illusory concept, and whereby there have come into existence conditions threatening to obstruct war production, and the production and distribution of essential civilian commodities, and the rendition of essential services, professional and otherwise, and to divert essential manpower, materials and transportation facilities, and to cause inflation, and all of the foregoing situations and conditions being a threat to the successful prosecution of the war and essential civilian activities, and to the public safety, health, and general welfare of the people of the State of New York, it is hereby declared that a public emergency exists, which is increasing in intensity without slackening and without promise of relief so long as present war conditions continue, and that action by the legislature is imperative and

will not admit of delay. It is hereby found, therefore, as a matter of legislative determination, that for the duration of such emergency, the establishment of a maximum rent for office and retail store and other business space at a level of fifteen per centum above rents charged on June first, nineteen hundred forty-four or at a level otherwise determined as hereinafter provided, will curb the evils arising from such emergency and will accomplish the purposes hereof. This act is declared to be a measure designed to protect and promote the public health, safety and general welfare, to aid the successful prosecution of the war, and essential civilian activities, and to conserve manpower, essential materials and transportation facilities, and to prevent inflation, and is made necessary by an existing emergency."

Section 8 of the Act provides as follows:

"So long as the tenant continues to pay the rent to which the landlord is entitled, under the provisions of this act, no tenant shall be removed from any business space, by action or proceeding to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and notwithstanding the issuance of any order to dispossess, warrant or process prior to the effective date of this act, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which is inconsistent with any of the provisions of this act, * * *."

Chapter 314 of the Laws of New York of 1945 thus declared that a public emergency due to wartime conditions existed with respect to office space, retail stores and other business space in certain cities and fixed for the duration

of such emergency the establishment of a maximum rent for such office space, retail stores and other business space at a level of fifteen per centum above the rate charged on June 1, 1944. Section 14 of Chapter 314 declared the emergency shall be deemed to continue until July 1, 1946.

Upon the application by the respondent for a further stay under the Rent Control Law, the District Court held that it was duty bound to respect the changed law of the State of New York with respect to the possession of real estate, as embodied in Section 8 of the Rent Control Law; and modified its order of February 1, 1945, to the extent that respondent was permitted to remain in possession of the premises until July 1, 1946, the expiration date of the emergency under that statute, upon condition that respondent pay for use of the premises a rental to be fixed in accordance with the provisions of the Rent Control Law.

Petitioner appealed to the Court of Appeals for the Second Circuit, which unanimously affirmed the order of the District Court. It is from this affirmance by the Court of Appeals that petitioner attempts to appeal to this Court.

Inasmuch as the real estate involved herein is situated in New York, there can be no serious dispute that a federal court, sitting in bankruptcy, in adjudicating the rights of the parties with respect to local real estate must apply the law of the state "which in such matters is supreme" (*Thompson* v. *Magnolia Co.*, 309 U. S. 478, 484).

Compare:

Erie v. *Tompkins*, 304 U. S. 64;
Guaranty Trust Co. of New York v. *York*, 326 U. S. 99.

It is clear under the decision of this Court in *Guaranty Trust Co.* v. *York, supra,* that the right of petitioner to obtain possession of the real estate affected substan-

tive, rather than procedural, rights under the Rent Control Law, and as such the state law was binding upon the District Court.

In the *York* case, this Court clarified the age old problem of substantive and procedural rights as related to conflicting jurisdictions between the state and federal courts. This Court laid down the principle that in cases where the state law is controlling, the federal courts may not disregard state law by "terminological niceties" with respect to the differences between substantive and procedural rights. The only important question to be answered, the Court stated, in deciding whether a right involved is substantive or procedural is:

> "* * * Does it significantly affect the result of a litigation for a federal court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties in a State court?"

In order to apply the test laid down in the *York* case, in determining the applicability of the state law, whether substantive or procedural, we must examine the result in a New York state court of similar litigation. The legal effect of Section 8 of Chapter 314 of the New York Laws of 1945 was considered by the Appellate Division of the Supreme Court (1st Department) in *Cohen* v. *Starke*, 269 App. Div. 256, 55 N. Y. Supp. 2nd 337. In that case the Court was concerned with commercial space as defined in rent control legislation contained in Chapter 3 of the New York Laws of 1945. Chapter 314, companion legislation, deals with "business" space. Sections 8 of both acts are identical except one applies to "business", the other to "commercial" space.

In the *Cohen* case two tenants held under leases which provided that they could be terminated by the landlord prior to their expiration. The landlord exercised this privilege, cancelled the leases as of January 8, 1945, and instituted proceedings to recover possession of the prem-

ises on January 9th, when the tenants failed to surrender up possession. On January 15, 1945, the tenants consented to dispossess orders and warrants were issued on January 16, 1945, execution of which was stayed until January 31, 1945. Thereafter, both tenants paid the rent required for January, 1945, to cover their use of the premises to January 31, 1945, under the Act, one on January 15, 1945, the other on January 27, 1945.

On January 24, 1945, the Rent Control Law relating to commercial properties became effective by Chapter 3 of the New York Laws of 1945. The Court in the *Cohen* case specifically held that the tenants were entitled to the protection of the Rent Control Law notwithstanding the fact that their leases had been validly terminated and that the dispossess warrant had been issued but not executed prior to the effective date of the Act. The Court said in part (p. 260):

> "On January 24, 1945, the appellants were tenants, within the meaning of the act. Both were entitled to the use and occupancy of their respective spaces and both had paid or offered the amounts to which the landlord was entitled under the provisions of the law. So long as they were ready, able and willing to meet the conditions imposed, their possession was not to be interfered with during the effective period of the Act. The City Marshal was therefore justified in refusing to execute the warrants since Section 8, as originally enacted, prohibits 'any person' from removing such a tenant from possession notwithstanding that his lease was expired or 'otherwise terminated,' as in this case by summary proceedings.
>
> • • •
>
> "Save for certain specified exceptions not here material, the legislation suspends, from January 24, 1945, until July 1, 1946, all possessory remedies available to owners of commercial space for the purpose

of removing therefrom tenants in possession on the effective date of the law, provided, however, that the tenants continue to pay to the landlords the rent to which they are entitled under the provisions of the Act" (p. 262).

The similarity of the facts in the *Cohen* case to those of the instant case is striking. In both cases, upon the effective date of the Rent Control Acts in question, the leases had been cancelled. In both cases final orders of dispossess had been entered prior to the effective date of the Rent Control Acts but execution was stayed until a date after the effective date of the acts. Although the leases had been cancelled in both cases, the tenant paid the rent due under the Act in the *Cohen* case, and tendered it in the instant case (R., pp. 9, 10).

Thus, it is evident under the test laid down by this Court in the *York* case, *supra*, that the Rent Control Act changed substantive and not procedural rights of the parties.

Under such facts, and the clear provisions of the Rent Control Act as applied by the Cohen decision, the District Court properly held the Rent Control Act applicable to the instant case since the function of the District Court is to ascertain the state law and apply it. *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 237. The mere fact that the dispossess order of the District Court was entered prior to the enactment of the Rent Control Law, which changed the law of New York with respect to a landlord's right to possession of real estate, does not absolve a federal court from its obligation to respect the changed law of the state.

Huddleston v. *Dwyer, et al.*, 322 U. S. 232, 236.

In the *Huddleston* case, in clear unmistakable language, this Court laid down the applicable rule, stating (p. 236):

"And a judgment of a federal court ruled by state law and correctly applying that law as authorita-

> tively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. 'Until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.' Vandenbark v. Owens-Illinois Co., 311 U. S. 538, 543."

It is submitted that the doctrine of *Guaranty Trust Co.* v. *York, supra,* and *Huddleston* v. *Dwyer, supra,* applies with particular force to the instant case, wherein departure from the state law would constitute a violation of state public policy caused by a declared public emergency.

Petitioner, on page 10 of his brief, cites *Hodges* v. *Snyder,* 261 U. S. 600, and *McCullough* v. *Virginia,* 172 U. S. 102, for the principle that rights once vested by a judgment cannot be taken away by subsequent state legislation. The cited cases have no applicability to the facts of the instant case.

In the *McCullough* case, this Court was concerned with the unconstitutional impairment of property rights by subsequent state legislation. In that case the judgment of the State Supreme Court seemed in its opinion merely to be a reversal of a previous construction by it of a statute upon whose strength a contract had been made. In fact, however, the judgment gave effect to an existing statute impairing the obligation of the contract in violation of Article I, Section 10, of the Constitution.

See *Tidal Oil Co.* v. *Flanagan,* 263 U. S. 448, 453.

The *McCullough* case did not involve the police power of the state legislature. As the Court below stated, in disposing of the constitutional objection to the Rent Control Act (R., pp. 47-48):

"The fifth and last objection is that the act is unconstitutional under the Fourteenth Amendment as a taking of property without due process. As we have just said, it does indeed take the lessor's property, though only for a limited period and not without compensation; but it does not deny him 'due process,' unless it would do so to compel those, who held the food supply in a time of shortage, to distribute it at less than the highest prices they could exact. It has now for many years been accepted law that the ownership of property, certainly when like land it is limited, does not entitle the owner to press to the extreme the advantage which its scarcity permits in times of 'emergency.' Block v. Hirsch, 256 U. S. 135; Marcus Brown Co. v. Feldman, 256 U. S. 170; Levy Leasing Co. v. Siegel, 258 U. S. 242. The courts of New York are unable to distinguish the present 'emergency' from that of twenty-five years ago. Twentieth Century Associates v. Waldman, 294 N. Y. 571. So are we."

This Court had occasion recently to reaffirm the fundamental principle that a state in the exercise of its police power has wide discretion in enacting legislation for the protection of its citizens and, incidentally, impairing contract obligations without violating constitutional rights. See *East New York Savings Bank* v. *Hahn, et al., supra.*

The Rent Control Law expressly made all suits for the recovery of possession of real estate during the emergency period a matter of public concern. Further, involving as it does the exercise of the police power of the state in an emergency period, the act is not vulnerable to attack on constitutional grounds. See *East River Savings Bank* v. *Hahn, et al., supra; Cohen* v. *Starke, supra.*

Petitioner in its brief (pp. 10-11) suggests that the decision of the courts below respecting the changed law of the state represents a veto of a valid federal judg-

ment, and that the existence of such power in the state is questionable. In *Thompson* v. *Magnolia, supra,* this Court stated that although the jurisdiction of the Bankruptcy Court was exclusive and non-delegable, the federal court in exercising such jurisdiction must apply the state law in adjudicating the substantive rights of the parties in local realty. In *Huddleston* v. *Dwyer, supra,* this Court laid down the principle that where a federal District Court had correctly applied controlling state law, its decision must be reversed if, while the matter is still *sub judice,* the state law is changed. Thus we see that a change in state law may necessitate a change in a federal judgment or order which is based on such state law. It is not a question of a veto of a federal judgment by changed state law. Rather, it is the duty of the federal court to conform to state law in adjudicating state created rights that requires the federal court to adapt its own conclusion to the changed state law. The rationale of the principle requiring federal courts to apply the local law in passing upon state created rights has been fully expounded in the decisions of this Court in *Erie* v. *Tompkins, supra; Guaranty Trust* v. *York, supra.*

The decision under review presents no novel or new question requiring the attention of this Court. Respondent concedes that the lease in question has been cancelled and that petitioner, but for the Rent Control Act, would be entitled to possession. However, at the time of the effective date of the Rent Control Act respondent was legally in possession of the premises under an order of the District Court. The District Court having jurisdiction of the property at such time, properly respected the changed New York law.

POINT II

Respondent was a tenant entitled to invoke the protection of the Rent Control Law.

Petitioner contends that respondent is not a "tenant" entitled to invoke the protection of the Rent Control Law. The mere statement of that contention immediately indicates that the question involved is one of construction of a state statute, and not such a question as to justify a petition of certiorari to this Court. Especially is this true where the state court has construed the statute in a way contrary to the contention of petitioner (*Cohen* v. *Starke, supra,* Point I), and where the local federal judges have already construed such local law in harmony with the state court. As this Court has stated in *Thompson* v. *Consolidated Gas Co.,* 300 U. S. 55, at page 74:

> "When not instructed by some decision of a state court, we are disposed * * * to accept the construction given by the lower federal court to a statute of the State, particularly when that court is composed, as in this instance, wholly of citizens of the State, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws." See *Huddleston* v. *Dwyer, supra,* Point I.

The court below found that respondent was a tenant within both the words and the purpose of the Rent Control Law, stating (R., pp. 45, 46):

> "Finn was a 'tenant' within both the words and purpose of the 'Rent Control Law.' Section 2(e) defines that word to include 'a lessee * * * or other person entitled to the possession * * * of any business space.' We may assume that, as the leases came to an end as of August 26, 1943, Finn was not a 'lessee' on January 24, 1945; nevertheless, any privilege of

the debtor in the premises passed to him, and if the debtor would have been 'entitled to the possession' of the parcels on January 24, 1945, he was so entitled. He was in fact in possession and, although we had, it is true, already decided the appeals, our mandates had not gone down, and the judge's stay was still in effect, under which Finn was 'entitled' to the possession which in fact he had. The situation was substantially on all fours with that in *Cohen* v. *Starke*, 269 App. Div. 256, where a lessor cancelled two leases on January 8, 1945, the warrants of eviction on which issued on January 16, 1945. Execution of the warrants was, however, stayed by agreement until January 31, 1945, which was seven days after the act took effect. The lessor argued that, since under Sec. 1434 of the New York Civil Practice Act the issuance of the warrants had put an end to the leases, the 'Rent Control Law', did not apply. But the court said 'no'; that the lessees 'were tenants within the meaning of the act' (p. 260)—an inescapable conclusion, as it seems to us."

Thus, we see that the court below independently construed the state statute in harmony with the state court's own interpretation, as set forth in *Cohen* v. *Starke, supra.* It is apparent that the question of whether or not respondent is a person "entitled to possession or to the use or occupancy of the premises" within the meaning of the Rent Control Law, involves the construction of state law. As such, it is submitted that the question is not of sufficient importance to justify the attention of this Court, since petitioner's contentions in this respect have been rejected not only by the state court but also by the Federal District Court, and the three judges of the Circuit Court of Appeals.

Looking at petitioner's contention upon the merits, we find it is without foundation under the very wording of the statute involved.

Sections 2 (d) and (e) define landlord and tenant as follows:

> "(d) 'Landlord.' An owner, lessor, sublessor, receiver, trustee, executor, assignee, or other person receiving or entitled to receive rent for the use or occupancy of the whole or a part of any business space.
>
> "(e) 'Tenant.' A lessee, sublessee, licensee, or other person entitled to the possession or to the use or occupancy of the whole or a part of any business space.' "

A mere reading of these comprehensive definitions indicates that the legislature framed the Act so as to cover every form of landlord/tenant relationship in order to effectively control the evils necessitating the legislation. The broad scope of the Act is again illustrated by the language of the legislature in Section 8 thereof (Point I, *supra*).

From the very purpose of the Act, as indicated in Section 1 thereof, and from the broad language used by the state legislature in fixing the scope of the operation of the Act, it is obvious that the state legislature intended to protect the occupancy of any person who was in legal possession of New York real estate on the effective date of the Act. The all-embracing statutory definition of "tenant" in Section 2(e) is sufficiently wide to encompass respondent, who was legally holding possession of the premises under the stay order of the District Court.

Petitioner claims that inasmuch as respondent's lease had been cancelled, respondent was not legally entitled to possession within the meaning of Section 2(e). As pointed out in Point I, *supra*, the state court in *Cohen* v. *Starke* had occasion to pass upon substantially the identical question here presented and such ruling is binding on the federal courts since the controversy involves state-created rights. See *Thompson* v. *Magnolia Co., supra; Guaranty Trust Co. of N. Y.* v. *York, supra.*

Petitioner attempts to distinguish the *Cohen* case in two alleged "vital" particulars: First, that there had been no payment of rent or acceptance of rent by petitioner since the lease was terminated; and second, that petitioner had not consented to any stay of execution.

With respect to the first ground of distinction, petitioner concedes that respondent tendered the payment of rent legally required under the provisions of the Rent Control Law (Petitioner's Brief, p. 14). Section 3 of said law makes it mandatory on every landlord to furnish each tenant within twenty days after the effective date of the act with a notice specifying the amount of the emergency rent computed under the provisions of said act. It is undisputed that pursuant thereto petitioner furnished respondent with such a statement, that the respondent tendered the amount required by the statement, and that petitioner refused to take the proffered payment (R. pp. 19, 22-25).

Furthermore, the payment of rent, as rent, is an unimportant fact bearing upon the issue of whether or not respondent was a tenant within the meaning of the act. In the *Cohen* case, the state court did not attach any significance to the payment of rent, as rent. It held, as the court below points out, that although the lease had been cancelled and an order of dispossess had been entered prior to the effective date of the act, the tenant was entitled to the protection of the act since he was entitled to possession on the effective date of the act. In the *Cohen* case, and in the instant case, concededly no rent, as rent, was due the landlord since the leases had been cancelled. However, under the provisions of the act, a person in possession may obtain the protection of Section 8 of the Act only as long as he makes the payment of emergency rent to the landlord in accordance with the requirements of the statute. In the *Cohen* case, the tenant paid the emergency rent required under the act, and in the instant case respondent tendered it. Clearly, the mere fact of

refusal of the tendered emergency rent would not deprive respondent of his status of a protected tenant within the meaning of the act. The only relevancy of payment, or offer of payment, both in the *Cohen* case and in the instant case, is governed by the fact that a protected tenant may lose his rights under the act if he fails to pay or tender to pay the emergency rent.

Petitioner's second ground of attempted distinction is predicated upon the fact that petitioner did not consent to any stay of execution, and that the various stay orders, postponing the respondent's time of surrender, were granted against petitioner's opposition. It is undisputed that petitioner never appealed from the orders of extension granted by the District Court, and the propriety of such orders is not open to question at this late date. Further, the fact of the landlord's consent or lack of consent to the stay of execution was not relied upon by the court in the *Cohen* case in deciding that the tenant there came within Section 2(e) of the Act. Section 8 of the Act makes no distinction between dispossess orders granted over objection or upon consent. There is no validity to petitioner's attempted distinction in this respect.

No federal question is here presented as to the interpretation and effect of the stay orders entered by the District Court. The only questions presented involve the construction of the state Rent Control Law, and whether or not respondent is a person entitled to possession of the realty involved herein so as to come within Section 8 of said Act. Guided by the controlling decision of the state court in the *Cohen* case, *supra,* both the District Court and the Court of Appeals construed the state statute in respondent's favor, and their interpretation of the local law under such circumstances does not present a matter requiring the attention of this Court. See *Thompson* v. *Consolidated Gas Co., supra.*

POINT III

The Rent Control Law affects substantive, not procedural, rights of the parties and was binding on the District Court.

The contention made by petitioner in Point III of its brief that said act affects procedural and not substantive rights of the parties is without merit. There can be no question that state law applies to the rights of the parties herein with respect to New York realty. *Thompson* v. *Magnolia, supra.* In the *York* case, this Court held that whether the right involved is substantive or procedural, is determined by the answer to the question:

> "'* * * Does it significantly affect the result of a litigation for a federal court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties in a State court?'"

The state court in *Cohen* v. *Starke* (Point I, *supra*) ruled that a tenant was entitled to the protection of the Rent Control Act under circumstances substantially identical with those of the instant case. Thus, under the principle of the *York* case, the Act affects substantive and not procedural rights.

The Court below, in disposing of this question, stated (R., p. 47):

> "The third objection is that the act merely changed procedure in the state courts. On the contrary, we can imagine nothing more vitally intervening in the relation of lessor to lessee; in effect, the act impounds the lessor's land for the period of the 'emergency,' and gives it to the lessee at an advance arbitrarily fixed at fifteen per cent, or at one found by a court to be 'reasonable.' It suspends all freedom of contract between the two; it favors those who are already in

possession, by excluding others whose need may be greater, and whose deserts may be higher. It cannot be seriously argued that, because this object is achieved by curtailing the lessor's remedies, the statute itself is merely 'procedural.' "

To hold otherwise would create the anomalous situation of having one set of rules governing one building in New York City and another set of rules governing its next door neighbor, merely because of the accident of federal jurisdiction of one New York building through corporate reorganization. Such a result would indeed be a "mischievous practice" and cannot be tolerated under the clear decisions of this Court. *Guaranty Trust Co.* v. *York, supra; Thompson* v. *Magnolia, supra,* at page 404.

POINT IV

Section 8(e) of the Rent Control Law does not "discriminate against owners of real estate occupied by bankruptcy trustees in violation of the Fourteenth Amendment."

In Point IV of petitioner's brief, it argues that Section 8(e) of the Rent Control Law discriminates against owners of real estate occupied by bankruptcy trustees in violation of the Fourteenth Amendment.

Section 8(e) of the Act provides that a tenant whose lease has expired may lose his right to protection under the Rent Control Law if, pursuant to demand by the landlord, the tenant refuses to renew such lease for a like term or for such shorter term as the landlord may elect. Petitioner argues that this does not apply to a reorganization trustee inasmuch as such trustee could not renew such a lease, or is not free to contract. This argument is predicated upon the erroneous assumption that a corporate trustee cannot enter into contracts. Every corporate

trustee has implied authority to enter into any and all contracts necessary and incident to the ordinary operation of corporate affairs. In contracts coming outside the scope of such activities, it is, of course, necessary for the corporate trustee to secure the approval of the District Court. The contention of petitioner in this respect is startling since it is the petitioner who refuses to make a new lease, and not the respondent-trustee. Petitioner has consistently opposed the efforts of respondent to assume the old lease which petitioner cancelled.

In disposing of the argument regarding discrimination, the court below points out (R., p. 46):

> "Nor is there the least reason to believe that the act did not mean to apply to property within the custody of the Bankruptcy Court. Were that true, we should have to impute to the legislature a purpose to discriminate against lessees which chanced to be in process of liquidation or reorganization: a discrimination, capricious and totally out of harmony with the general object of the act, as we held in a closely similar situation. *Cullen* v. *Bowles,* 148 Fed. (2) 621. The receiver of property being administered in a federal court is subject to the general municipal regulation of the state, and must conform to its law in conducting his business (Sec. 124, Title 28, U. S. Code), *Gillis* v. *California,* 293 U. S. 62. Trustees under Chapter X are as much so subject as ordinary receivers in equity (*Palmer* v. *Webster and Atlas Bank,* 312 U. S. 156, 166), and Finn, who was obliged to conform to the 'Rent Control Law', might also invoke its benefits. * * *"

Clearly, there is no merit in petitioner's contention that Section 8(e) of the Act discriminates against owners of real estate occupied by bankruptcy trustees.

POINT V

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH LORENZ,
Counsel for Respondent.

Dated April 24, 1946